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No. 94-1833

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1994

KATHRYN MOSER, ET AL., PETITIONERS

v.

FEDERAL COMMUNICATIONS COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether Congress, in establishing a general requirement that persons obtain consent before initiating prerecorded telephone messages, could constitutionally authorize the Federal Communications Commission to consider exemptions for noncommercial speech.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A12) is reported at 46 F.3d 970. The opinion of the district court (Pet. App. A13-A33) is reported at 826 F. Supp. 360.

JURISDICTION

The judgment of the court of appeals was entered on February 6, 1995. The petition for a writ of certiorari was filed on May 5, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Telephone Consumer Protection Act of 1991 (TCPA), Pub. L. No. 102-243, 105 Stat. 2394 (1991), addressed a number of problems created by technological advances in telemarketing. The provision at issue in this case, 47 U.S.C. 227(b)(1)(B) (Supp. V 1993), makes it unlawful "to initiate any telephone call to any residential telephone line using an artificial or prerecorded voice to deliver a message without the prior express consent of the called party." Congress enacted that prohibition as a "time, place, and manner restriction on speech." S. Rep. No. 178, 102d Cong., 1st Sess. 4 (1991). As the committee report explained, the basic prohibition "does not discriminate based on the content of the message" and "applies equally whether the automated message is made for commercial, political, charitable or other purposes." *Ibid.*

Although the statute applies to all types of speech, Congress authorized the Federal Communications Commission (FCC) to exempt certain calls through rulemaking if the agency concluded that exemptions were appropriate. The authority to make such exemptions extends to "calls that are not made for a commercial purpose," 47 U.S.C. 227(b)(2)(B)(i) (Supp. V 1993), and calls made for a commercial purpose that "will not adversely affect the privacy rights that [the prohibition] is intended to protect" and "do not include the transmission of any unsolicited advertisement," 47 U.S.C. 227(b)(2)(B)(ii) (Supp. V 1993).[1]

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[1] The term "unsolicited advertisement" is defined as "any material advertising the commercial availability or quality of any property, goods, or services which is transmitted to any

After the TCPA was enacted, the FCC promulgated regulations that exempted certain categories of calls from the statutory restriction. 57 Fed. Reg. 48,333 (1992); 47 C.F.R. 64.1200(c). The regulations exempted any

> call or message by, or on behalf of, a caller:
>
> (1) That is not made for a commercial purpose,
>
> (2) That is made for a commercial purpose but does not include the transmission of any unsolicited advertisement,
>
> (3) To any person with whom the caller has an established business relationship at the time the call is made, or
>
> (4) Which is a tax-exempt nonprofit organization.

47 C.F.R. 64.1200(c).

2. Petitioners are the National Association of Telecomputer Operators and the Association's president, Kathryn Moser. They filed suit on November 12, 1992, alleging that Section 227(b)(1)(B) on its face violates the First Amendment and the equal protection component of the Due Process Clause of the Fifth Amendment. After entering a preliminary injunction enjoining enforcement of the statute, the district court granted summary judgment for petitioners. Pet. App. A13-A33. The court first noted (*id.* at A18-A19) that it lacked jurisdiction to review the regulations promulgated by the FCC that exempt noncommercial

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person without that person's prior express invitation or permission." 47 U.S.C. 227(a)(4) (Supp. V 1993).

calls from the scope of the statutory restriction, because review of FCC regulations lies exclusively in the courts of appeals. See 28 U.S.C. 2342; 47 U.S.C. 402(a). The court concluded, however, that it had jurisdiction to consider the constitutionality of the authorization to promulgate regulations. Pet. App. A18.

Turning to the merits, the court analyzed the statute under the criteria applicable to restrictions on commercial speech. Those factors look to whether the regulation at issue (1) implements a substantial governmental interest, (2) directly advances that interest, and is (3) narrowly tailored to achieve the desired objective. See *Central Hudson Gas & Elec. Corp.* v. *Public Serv. Comm'n*, 447 U.S. 557, 563-566 (1980).

The district court held that the statute violates the First Amendment, for two reasons. The court held that "there is no reasonable fit between the [statutory] goals" of protecting residential privacy and "the means chosen to reach those goals in the distinction Congress drew between commercial and noncommercial messages." Pet. App. A28. The court also held that, because most commercial telephone solicitations are today made by live solicitors and not by automated, prerecorded messages,[2] there is also no reasonable fit

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[2] The district court stated that "[e]vidence presented to this court indicates that the solicitations being banned by the TCPA make up less than three percent of the telemarketing calls received by Americans." Pet. App. A30. In our view, the court of appeals erred (*id.* at A8 n.4) in stating that the district court "adopted" the 3% figure as correct. Indeed, the district court went on to acknowledge the ambiguity in the evidence, stating that, "[u]nder any interpretation of the available evidence, the TCPA's promotion of residential privacy would

between the goal of protecting privacy and the statutory distinction between prerecorded messages, which are prohibited, and commercial messages introduced by an operator, which are not. *Id.* at A29-A32. In the district court's view, its result followed from this Court's decision in *City of Cincinnati* v. *Discovery Network, Inc.*, 113 S. Ct. 1505 (1993).

3. The court of appeals reversed. Pet. App. 1a-12a. Initially, the court agreed with the district court that it had no jurisdiction to review the FCC's regulations establishing an exemption for certain noncommercial calls, and stated that it would therefore not review the FCC's regulations. *Id.* at. A7. The court explained that, "[b]ecause nothing in the statute requires the Commission to distinguish between commercial and noncommercial speech, * * * the statute should be analyzed as a content-neutral time, place, and manner restriction" on "all automated telemarketing calls without regard to whether they are commercial or noncommercial." *Id.* at A7-A8. The analysis of such restrictions, which is "essentially identical" to the analysis of regulation of commercial speech, *id.* at A8, requires consideration of whether the restrictions "are justified without reference to the content of the restricted speech, [whether] they are narrowly tailored to serve a significant governmental interest, and [whether] they leave open ample alternative channels for communication of the information." *Ibid.*, quoting *Ward* v. *Rock Against Racism*, 491 U.S. 781, 791 (1989).

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be by way of eliminating a very small percentage of the millions of telemarketing calls being made every day." *Id.* at A30.

The court of appeals noted that the government's "significant interest" in protecting residential privacy was undisputed, and that it was likewise undisputed "that curbs on telemarketing advance that interest." Pet. App. A8. The question therefore was "whether a ban on automated telemarketing calls is narrowly tailored to the residential privacy interest, and whether ample alternative channels of comunication remain open." *Id.* at A9.

With respect to the relationship between the statutory ban on automated telemarketing calls and the interest in residential privacy, the court held that "[t]he district court did not give sufficient weight" to Congress's "extensive findings" of "consumer concerns about telephone solicitation in general and about automated calls in particular." Pet. App. A9. Moreover, apart from the fact that Congress had cited concerns peculiar to prerecorded telephone solicitations, the court explained that the legislature was free to address one aspect of the telemarketing problem—the use of automated, prerecorded messages—without regulating all commercial telemarketing calls. *Id.* at A9-A10, citing *United States* v. *Edge Broadcasting Co.*, 113 S. Ct. 2696, 2707 (1993) (the courts do not "require that the Government make progress on every front before it can make progress on any front"); *R.A.V.* v. *City of St. Paul*, 112 S. Ct. 2538, 2545 (1992) ("the First Amendment imposes not an 'underinclusiveness' limitation but a 'content discrimination' limitation upon a State's prohibition of proscribable speech").

Finally, the court noted that "[t]he restrictions in the Act leave open many alternative channels of communication, including the use of taped messages introduced by live speakers or taped messages to

which consumers have consented, as well as all live solicitation calls." Pet. App. A11. Because the statutory ban on automated telemarketing calls is content-neutral, is "narrowly tailored to advance" the government's interest in protecting residential privacy, and leaves open "ample alternative channels of communication," the court held that it does not violate the First Amendment. *Id.* at A12.

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or of another court of appeals. Further review is not warranted.

1. Petitioners do not pursue their contention, rejected by the court of appeals (see Pet. App. A9-A10), that the statute impermissibly distinguishes between live and prerecorded telephone messages. Instead, petitioners argue that the statute is unconstitutional because it authorizes the FCC to make a distinction, under some circumstances, between commercial and noncommercial calls. See Pet. i, 12.

As the court of appeals recognized, this case does not squarely present the question whether Congress may distinguish by statute between commercial and noncommercial automated calls. The statute as enacted does not compel any distinction between commercial and noncommercial speech. As the Senate report explained, the statute "does not discriminate based on the content of the message" and "applies equally whether the automated message is made for commercial, political, charitable or other purposes." S. Rep. No. 178, *supra*, at 4. Accordingly, the question presented by this case is whether Congress may, consistent with the First Amendment, ban all auto-

mated calls. Since petitioners neither present that question in their petition nor otherwise argue that Congress lacks such power, review by this Court is not warranted.

2. Rather than attack Congress's power to ban all automated calls, petitioners argue that Congress's grant of authority to the FCC to distinguish between commercial and noncommercial automated telemarketing violates the First Amendment.

Initially, petitioners may not use this case to challenge the FCC's implementation of that authority, since any such challenge must be brought in the first instance in the court of appeals, not the district court. See 28 U.S.C. 2342; 47 U.S.C. 402(a); Pet. App. A6-A7.[3] Accordingly, the only question presented in this case is whether the bare grant of authority is constitutional. This Court has frequently cautioned against the premature and abstract resolution of constitutional issues. See, *e.g.*, *United States* v. *National Treasury Employees Union*, 115 S. Ct. 1003, 1019 (1995); *Ashwander* v. *TVA*, 297 U.S. 288, 346-347 (1936) (Brandeis, J., concurring). In light of that principle, resolution of the question whether the grant of authority to the FCC violates the First Amendment should await a case in which that authority has been exercised by the FCC. See, *e.g.*, *Ruckelshaus* v. *Monsanto Co.*, 467 U.S. 986, 1019-1020 (1984); *Pennell* v. *City of San Jose*, 485 U.S. 1, 10-11 (1988); *Hodel* v.

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[3] Following oral argument in the court of appeals, petitioners filed a petition for review of the FCC rulemaking in the court of appeals. The petition was dismissed as untimely. *Moser* v. *FCC*, No. 94-70835 (9th Cir. May 5, 1995).

Virginia Surface Mining & Reclamation Ass'n, 452 U.S. 264, 296-297 (1981).[4]

In any event, it is clear that the congressional grant of authority does not violate the First Amendment. A grant of authority to distinguish between commercial and noncommercial speech is valid so long as there is some possible set of circumstances under which that authority can be constitutionally exercised. Nothing in the commercial speech doctrine prohibits a distinction between commercial and noncommercial speech in all cases, regardless of the nature of the regulation at issue, the relative harm caused by the two types of speech, or the alternative means of communication open to commercial speakers. Indeed, the basic proposition that "speech proposing a commercial transaction is entitled to lesser protection than other constitutionally guaranteed expression," *Discovery Network*, 113 S. Ct. at 1513, leads directly to the conclusion that there can be situations in which commercial speech—but not noncommercial speech—could be regulated.[5] Accordingly, Congress's grant of authority to make such a distinction is constitutionally valid on its face.

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[4] Cf. *California Bankers Ass'n* v. *Shultz*, 416 U.S. 21, 64 (1974) ("The question is not what sort of * * * requirements *might* have been imposed by the [agency] under the broad authority * * * in the Act, but rather what sort of * * * requirements [the agency] did *in fact* impose under that authority.").

[5] Far from establishing a general rule requiring identical treatment for commercial and noncommercial speech, this Court in *Discovery Network* stressed that its holding was "narrow" and did not address whether, under some circumstances, a community "might be able to justify differential treatment of commercial and noncommercial [messages]." 113 S. Ct. at 1516.

3. Even if the statute were understood to constitute a regulation of commercial—but not noncommercial—speech, it would not violate the First Amendment, as construed by this Court in *Discovery Network*. Indeed, the record in the present case bears no resemblance to that held inadequate to support special treatment for noncommercial speech in *Discovery Network*.

In *Discovery Network*, the City of Cincinnati, motivated by aesthetic and safety considerations, prohibited newsracks that dispensed commercial handbills. The City conceded that it could not ban all newsracks and recognized that only 62 of the approximately 1,500 to 2,000 existing racks would be removed as a result of its actions. 113 S. Ct. at 1510. The ban thus had a negligible impact on the aesthetic goals the City sought to achieve. Nor were the aesthetic and safety problems posed by commercial newsracks in any way distinguishable from those posed by other newsracks. The City argued, nevertheless, that, even if the impact on its stated goals was minimal, it could ban commercial newsracks solely because of the lesser protection accorded by the Constitution to commercial speech.

In invalidating the City's action, the Court focused on the fact that the distinction drawn by the City "b[ore] no relationship *whatsoever* to the particular interests that the city ha[d] asserted." 113 S. Ct. at 1514. The Court stressed that "[t]he benefit to be derived from the removal of 62 newsracks while about 1,500-2,000 remain in place" was "minute" and "paltry." *Id.* at 1510. Nor could the City's action be justified by any distinction between commercial and noncommercial newsracks, both of which were "equally unattractive." *Id.* at 1514. As the Court made

clear, there could be no justification for banning a vehicle of commercial speech when the ban would not meaningfully serve a legitimate end. Even so, the Court carefully limited its holding to the record before it. See note 5, *supra*.

The exemption provision of the statute at issue in this case presents the reverse of the situation before the Court in *Discovery Network*. Congress was aware that prerecorded solicitations, like telephone solicitations generally, are chiefly generated by commercial enterprises. H.R. Rep. No. 317, 102d Cong., 1st Sess. 16 (1991). The data before Congress showed that noncommercial calls generally constituted a relatively low volume of solicitations, and the noncommercial calls (which would include solicitations from schools, churches and charities) tended to be far more expected and thus less intrusive. *Ibid.* The threat to residential privacy posed by noncommercial calls was accordingly much less than that posed by commercial calls.

Moreover, Congress reasonably determined that, although commercial calls are generally found to be intrusive, individuals find automated telephone calls to be particularly disturbing. For example, a consumer survey that was before Congress indicated that telephone calls "from people selling things" were rated as "very annoying" by 67% of respondents and that "[o]nly phone calls from a computer trying to sell something were found to annoy more people (70 percent)." H.R. Rep. No. 317, *supra*, at 9.

Finally, although prerecorded commercial calls had constituted only a small percentage of telephone solicitations thus far, that does not mean that banning them served no legitimate purpose. Of course, the numerous state bans on such telephone calls—which

petitioners would allege are unconstitutional—no doubt served to limit the growth of this technology. And petitioners themselves acknowledge that the technology for making prerecorded solicitations is rapidly evolving. See Pet. 18 n.6. Congress reasonably could have legislated based on the perception that, if allowed to proliferate unchecked, the number and intrusiveness of prerecorded commercial solicitations would increase markedly and create an increasingly pronounced problem.

Petitioners cite (Pet. 15) the congressional finding that "residential telephone subscribers consider automated or prerecorded telephone calls, regardless of the content or the initiator of the message, to be a nuisance and an invasion of privacy." See TCPA § 2(10), 105 Stat. 2394. That finding does not support petitioners' argument. Congress found evidence indicating that all types of prerecorded messages impinge on privacy. However, Congress recognized that its action was necessitated by the high volume of commercial telephone solicitations and was concerned to avoid unnecessary regulation of noncommercial speech. Congress was not constitutionally precluded from authorizing the FCC to consider whether noncommercial calls should be exempt where (1) such calls comprise a small percentage of prerecorded solicitations and (2) evidence before Congress indicated that the vast majority of consumer complaints concerned commercial messages.[6]

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[6] Petitioners also argue (Pet. 20-22) that the distinction between commercial and noncommercial messages violates the equal protection component of the Due Process Clause of the Fifth Amendment. That claim fails (particularly in the

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JUNE 1995

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context of the present facial challenge to the statute) for the same reasons as does petitioners' First Amendment claim.